



Comptroller General  
of the United States

Washington, D.C. 20548

Schatz  
147760

## Decision

**Matter of:** ProServe Corporation--Protest and Request for  
Declaration of Entitlement to Protest Costs

**File:** B-247948.2; B-247948.3

**Date:** October 5, 1992

Pamela J. Mazza, Esq., Andrew P. Hallowell, Esq., and Philip M. Dearborn, Esq., Piliero, Mazza & Pargament, for the protester.

Hugh R. Overholt, Esq., Richard N. Cook, Esq., Albert R. Bell, Jr., Esq., Maupin, Taylor, Ellis & Adams, P.C., for Dragon Services, Inc., and William R. Purdy, Esq., Ott, Purdy & Scott, Ltd., for American Service Contractors, L.P., interested parties.

Maj. Bobby G. Henry, Jr., Department of the Army, for the agency.

Sylvia Schatz, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Although reevaluation of proposals based on weighting of evaluation factors in descending order of importance (rather than equal weighting improperly used in initial evaluation) theoretically render score reductions under least important factor less significant, difference was minor and did not affect award decision where (1) under the proper weighting the factor was only slightly less important than the other two technical factors, and (2) protester's proposal was significantly downgraded under all three technical factors, so that shifting of relative weights would have limited effect in any case.

2. Allegation that evaluation of awardee's proposal under technical factor was too high because it failed to consider unsatisfactory past performance under a prior contract is without merit, where record shows agency did consider the information and did reduce the awardee's score, but also determined that awardee's most recent successful performance on a significant food services contract was the best indicator of the firm's technical ability, and that further score reduction was not warranted.

3. Selection of the awardee on the basis of its overall technical superiority, notwithstanding its slightly higher price, was proper where agency reasonably determined

awardee's higher-priced proposal was worth the additional cost, and cost/technical tradeoff was consistent with the evaluation scheme.

4. Protester is not entitled to award of the costs of filing and pursuing protest under section 21.6(e) of Bid Protest Regulations, even if we assume that the action was taken pursuant to the protest, where the agency took corrective action approximately 1 month after the protest was filed.

---

#### DECISION

ProServe Corporation protests the award of a contract to Dragon Services Corporation under request for proposals (RFP) No. DADA03-91-R-0056, for hospital food service management. ProServe also asks that we declare it entitled to recover the costs of filing and pursuing an earlier protest (B-247948), which we dismissed after the agency advised that it was reevaluating the best and final offers (BAFO) received under the RFP.

We deny the protest and the request.

The RFP, issued on September 20, 1991, requested proposals for a firm-fixed-price contract for hospital food service management at Fitzsimons Army Medical Center (FAMC) for base and option periods. The RFP stated that award would be made to the responsible offeror whose proposal was determined to be the most advantageous to the government, cost and other factors considered. The evaluation was to be based on the following technical factors, in descending order of importance: (1) technical; (2) management; and (3) quality control. The RFP advised offerors that cost/price (including option prices) was to be evaluated for total price, reasonableness, and balance. The RFP stated that, although the importance of price would increase as the technical quality differences between proposals decreased, price was secondary to technical quality.

Eight firms submitted initial proposals by the closing date. After the initial evaluation, the Technical Evaluation Team (TET) concluded that three firms, including ProServe and Dragon, were within the competitive range. Written discussions were initiated with all offerors in the competitive range and BAFOs were requested and received. After evaluation of the BAFOs, the Army made award to Dragon on the basis that its proposal was most advantageous to the government.

On March 13, 1992, ProServe protested the award to our Office, alleging, among other things, that Dragon's proposal was not the most advantageous to the government since it was

not the lowest priced. On April 15 (prior to the April 20 report due date), the Army advised the protester that, in preparing its report to our Office on this protest, the agency found that it incorrectly had evaluated the proposals. Specifically, the Army stated that the evaluation factors had been given equal weight instead of being weighted in descending order of importance, as required by the RFP. The agency stated that it therefore was taking corrective action by having a new TET reevaluate the BAFOs previously submitted. Performance of the contract by Dragon was allowed to proceed because the agency received ProServe's protest more than 10 calendar days after award. See Federal Acquisition Regulation (FAR) § 33.104(c)(5). Since the agency's decision to reevaluate the BAFOs rendered the protest academic, we dismissed the protest on April 22.

The new TET's rescoring of the BAFOs yielded the following results:

	Dragon	ProServe	Total Possible
Technical	26.60	23.45	33.95
Management	28.71	22.11	32.01
Quality Control	25.28	18.24	31.04
Total Technical	80.59	63.80	97.00

Price	\$10,544,060	\$9,893,500
-------	--------------	-------------

Independent government estimate (IGE) \$10,524,206

In the reevaluation, the TET determined that ProServe's BAFO was weaker in comparison to Dragon's under all the technical factors. The contracting officer determined from his review of the TET results that Dragon's exceptional technical rating reflected actual superiority. The contracting officer concluded that Dragon's technical advantages outweighed ProServe's lower price, and that Dragon's proposal would therefore be most advantageous to the government. Accordingly, on May 12, the Army notified ProServe that the award to Dragon would stand.

#### QUALITY CONTROL

ProServe argues that, since under the reevaluation quality control was the least important factor, its score reductions under that factor should have had less impact on its overall score than under the original evaluation, under which the factor improperly had been weighted equally with the others. The protester concludes that its score necessarily should have been higher under the reevaluation.

While ProServe is correct that assigning a factor less relative weight in a reevaluation will have the effect of reducing the impact of the original score reductions under

that factor, the effect under the circumstances here was minimal. This is primarily because, although the quality control factor was the least important of the three technical factors, it was not significantly less important than the other two technical evaluation factors. Specifically, as indicated above, out of the 97 available points, the quality control factor was worth only approximately 1 point less than the management factor and approximately 3 points less than the technical factor. Further, the record shows that ProServe's proposal was downgraded significantly, not only for the deficiencies under the quality control factor, but under all three technical factors. As a result, the slight shifting of weights, while somewhat reducing the impact of the score reductions under the quality control factor, had the offsetting effect of also somewhat increasing the impact of the reductions under the other factors. Since the protester does not challenge the agency's findings regarding the other deficiencies in its proposal and there is no evidence in the record that the agency's reevaluation of ProServe's proposal under the quality control factor was inconsistent with the RFP, we find no basis to question this aspect of the evaluation.

#### TECHNICAL

ProServe argues that the agency improperly failed to take into consideration under the technical factor Dragon's poor performance on a prior contract. Specifically, the protester maintains that under that contract, Dragon exceeded its subsistence expenditures by approximately \$87,000, incurred \$55,000 in contract deficiencies in the third option year, and exceeded the contract price by approximately 33 percent.

We will examine an evaluation only to insure that it was reasonable and consistent with the stated evaluation criteria. See Space Applications Corp., B-233143.3, Sept. 21, 1989, 89-2 CPD ¶ 255. The determination of the merits of proposals is primarily a matter of administrative discretion which we will not disturb unless it is shown to be arbitrary. Realty Executives, B-237537, Feb. 16, 1990, 90-1 CPD ¶ 288.

Our review of the evaluation documents shows that, although only one member of the TET made a remark concerning the prior FAMC contract, the contracting officer did in fact consider Dragon's poor prior performance under the contract in question. After reviewing the list (submitted by Dragon with its proposal) of similar food service contracts the firm performed at other locations, the contracting officer determined that, notwithstanding Dragon's cost overruns and deficiencies on the noted contract, the firm's most recent

successful performance on a significant food services contract at Fort Bragg was the best indicator of Dragon's technical skills for purposes of satisfying the current requirement. We see nothing illogical or unreasonable in the conclusion that recent good performance is more significant for evaluation purposes than less recent poor performance. As indicated above, Dragon's score was reduced under the technical factor. We find no basis for concluding that Dragon's score under this factor should have been reduced further.

#### COST/TECHNICAL TRADE-OFF

ProServe maintains that award to Dragon was not in accord with the RFP requirement that award be made to the offeror whose offer was most advantageous to the government, since Dragon's proposed BAFO price was above both ProServe's proposed price and the IGE.

In a negotiated procurement, the government is not required to make award to the firm offering the lowest price unless the RFP specifies that price will be the determinative factor. Radiation Sys., Inc., B-222585.7, Feb. 6, 1987, 87-1 CPD ¶ 129. Rather, where award is to be based on the best value to the government, as here, a cost/technical trade-off may be made in selecting an awardee subject only to the test of rationality and consistency with the established evaluation factors. Miller Bldg. Corp., B-245488, Jan. 3, 1992, 92-1 CPD ¶ 21.

The record supports the Army's cost/technical tradeoff here. The RFP provided that the technical factors were more important than price, and Dragon was rated superior to ProServe under all three technical factors. The agency cited as particular advantages Dragon's experience in hospital food management, its detailed phase-in plan for recruiting, training, and retaining staff, and its exceptional quality assurance plan. The contracting officer, with the concurrence of the TET, specifically determined that ProServe's approximately \$650,000 cost advantage was relatively minor compared to Dragon's significant technical advantage. We find nothing inherently unreasonable in the agency's conclusion and thus have no basis to object to the trade-off.

#### RESPONSIBILITY/BAD FAITH

ProServe contends that the affirmative determination of Dragon's responsibility was unreasonable and made in bad faith. Specifically, the protester maintains that given the fact that the contracting officer stated that he knew Dragon had been "convicted of fraud or a criminal offense in connection with obtaining a [prior] government contract,"

the contracting officer should have considered or investigated this information, and then found Dragon nonresponsible.

While we will review an affirmative responsibility determination where it is shown that it may have been made fraudulently or in bad faith, see Bid Protest Regulations, 4 C.F.R. § 21.3(m)(5) (1992); All Rite Rubbish Removal, Inc., B-241288, Jan. 31, 1991, 91-1 CPD ¶ 99, we find no such showing here. The Army specifically determined that Dragon has the capacity to perform the contract in accordance with the RFP, despite its prior conviction, which the Army noted occurred 7 years ago. The information relating to the criminal conviction did not mandate a nonresponsibility determination, and the mere fact that the Army exercised its discretion in favor of Dragon's responsibility does not constitute evidence of bad faith; it is not proof that contracting officials acted with the intent to harm ProServe. Id. The fact that the contracting officer did not conduct an independent investigation is not evidence of bad faith; Dragon specifically disclosed its prior conviction in its proposal, and nothing on the face of the information submitted to the contracting officer called into question the correctness of that information. See Roth Bros., Inc., B-235539, Aug. 2, 1989, 89-2 CPD ¶ 100. Under these circumstances, we will not review the agency's affirmative responsibility determination.

ProServe also maintains the agency may have been biased against the firm. Specifically, ProServe argues that Mr. Epps, a member of the new (reevaluation) TET, may have been influenced by his supervisor, Mr. Seymour, who the protester claims had a negative attitude toward ProServe. As indicated above, when a protester alleges bad faith or bias on the part of contracting officials, the protester must establish that the officials intended to harm the protester, since contracting officials are presumed to act in good faith. Parameter, Inc., B-241652, Feb. 28, 1991, 91-1 CPD ¶ 229. The protester has not submitted such proof, and we find no irregularities in the record that would corroborate the protester's allegation. We are left with no more than ProServe's speculation that Mr. Epps' evaluation of ProServe's proposal was influenced by Mr. Seymour or, indeed, that Mr. Seymour even had a negative opinion of ProServe. Thus, this allegation provides no basis for disturbing the awards. Sal Esparza, Inc., B-231097, Aug. 22, 1988, 88-2 CPD ¶ 168.

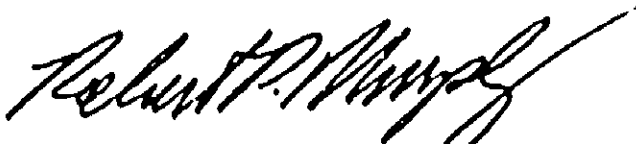
#### PROTEST COSTS

ProServe claims that the agency's reevaluation constituted corrective action in response to its original protest that the firm should have received award on the basis of its low

cost, and that it thus is entitled to recover the costs of filing and pursuing that protest under our Bid Protest Regulations, 4 C.F.R. § 21.6(e) (1992).

While our Office may award costs in circumstances where the record shows that the agency acted in violation of statute or regulation and took corrective action in response to the protest, see Building Servs. Unlimited, Inc.--Claim for Costs, B-243735.3, Aug. 27, 1991, 91-2 CPD ¶ 200, we will not award costs under this section if the corrective action was promptly taken. See Instrumentation Laboratory Co.--Request for Declaration of Entitlement to Costs, B-246819.2, June 13, 1992, 92-1 CPD ¶ 517. Even if we agreed that the Army has taken corrective action under our Regulations, it is clear that the action was prompt. As noted above, the initial protest was filed on March 13, and the agency communicated its intent to reevaluate the proposals on April 15. We have held that action taken approximately 1 month after the time a protest is filed constitutes prompt action. See KIME Enters., Inc.--Request for Declaration of Entitlement to Costs, B-241996.5, Dec. 9, 1991, 91-2 CPD ¶ 523. There are no circumstances here that warrant a different conclusion. Accordingly, we find the protester is not entitled to recover its protest costs.

The protest and the request are denied.

  
for James F. Hinchman  
General Counsel